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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 541

MARTIN AKERSON, *et al., Petitioners,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY BRIEF

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The Brief for the United States in Opposition to the Petition for Certiorari significantly does not contest the basic reason why certiorari should be granted—the importance of the statutory question at issue. Un-

less this Court reviews the decision below, serious doubts will remain as to whether the nation's obligations to those who have devoted their lives to the uniformed services have been fully met.[1] And a most troublesome cloud will hover over the morale of all the uniformed services, making more difficult the continued retention of those who are attracted to those services by the Congressional promises concerning retirement pay. To make sure that those promises are kept thus becomes directly related to considerations of national security and military morale. The existence of these problems, which literally affect millions of citizens, is not here denied by the Government.

The entire thrust of the Brief in Opposition is directed toward a demonstration of the correctness of the interpretation accorded the 1958 legislation by the Court of Claims. In certiorari terms, such an effort is of limited significance. The only relevant question posed at this juncture is whether the statutory questions are sufficiently important in and of themselves to warrant the attention of this Court.

On that score, indeed, the various statutory arguments advanced by the Government actually serve to augment the importance of the questions for certiorari

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[1] See *Berkey* v. *United States*, 361 F. 2d 983 (Ct. Cls.), where, subsequent to the instant decision, the Court of Claims referred to military retirement pay as "something the serviceman earns and has earned." The court indicated that retirement pay is so much more than a gratuity or pension that "there is even a question whether Congress could reduce or abolish that pay" for one who is already retired. 361 F. 2d at 990. That decision reinforces the appropriateness of resolving in this case the question whether the retirement pay formula claimed by petitioners was continued or inferentially abolished by Congress.

purposes. Basically, those arguments reveal an approach to the 1958 legislation "which confines itself to the bare words of a statute," *Lynch* v. *Overholser,* 369 U.S. 705, 710, and which makes "a fortress out of the dictionary," *Cabell* v. *Markham,* 326 U.S. 404, 409, thereby ignoring the specialized setting and declared purpose of the legislation in question. Such an approach is quickly revealed by the following factors in the Brief in Opposition:

1. The Government concedes (Opp. Br. 6) that the petitioners' rights survive the "Notwithstanding any other provision of law" language of Section 3(a) by placing them within the ambit of Section 4. But the Government then reiterates an unrealistic distinction between Sections 4(a) and 4(b), making the difference rest solely on whether the individual retired before or on June 1, 1958. Such a distinction ignores the specialized language which Congress here was using. The Government, like the Court of Claims, has simply ignored the critical distinction underlying the 1958 legislation relative to the types of service for which retired pay was prescribed in Sections 4(a) and 4(b).

(a) Section 4(a) refers primarily to that service of a non-regular or reserve nature which Congress has said (10 U.S.C. § 1331) merely makes the person "entiled" to retired pay upon application at age 60. Such a person does not "retire" from the uniformed services, nor is he considered "a member of the uniformed services retired." This is the type of person who was the main concern of Section 4(a), the person "entitled to retired pay" but who was not entitled under then existing law to retired pay increases by virtue of

active pay scale increases.[2] He was the one whom Congress primarily desired to benefit by granting a 6% cost-of-living increase.

Thus Section 4(a) was designed to identify the retirement pay to which the 6% cost-of-living increase was to apply, particularly for those "entitled" to retired pay who would not otherwise, under existing law, be entitled to any increase. The retirement pay chosen by Congress was that to which the person was entitled on May 31, 1958. So to read Section 4(a) is not, as the Court of Claims or the Government would have it (Opp. Br. 7-8), to read Section 4(a) out of the statute; rather it gives Section 4(a) a meaningful and consistent position in the statutory pattern.

(b) Section 4(b), on the other hand, refers to that service of a regular career nature from which one formally retires based upon length of service (*e.g.*, 10 U.S.C. §§ 3883-3889). Such a person continues subject to many military obligations and disabilities and is by law known as a retired member of the uniformed services. *United States* v. *Tyler,* 105 U.S. 244.

In seeking to justify what the Government concedes (Opp. Br. 8) is "a very limited application" of Section 4(b) to that handful of individuals who in fact retired on June 1, 1958, the Government relies on the "plain meaning" (Opp. Br. 7) of the words "retired . . . on the effective date of this Act." Such a surface reading of the language is dubious, to say the least.

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[2] Under 10 U.S.C. § 1401 such a person's retired pay was based exclusively on basic active duty pay in effect when retired pay was first granted, without regard to subsequent increases in active pay scales. Moreover, such a person had not been entitled to any retired pay for services rendered until the Act of June 29, 1948, 62 Stat. 1087, first gave it to him.

The Government practically concedes (Opp. Br. 8, fn. 3) that the word "retired" can refer to a status rather than to the fact of retirement on a particular day.[3] But more importantly, Section 4(b)'s reference to "a member of a uniform service retired under any provision of law" plainly indicates the specialized class of individuals described above who are covered by this subsection. In other words, Section 4(b)'s emphasis is not upon the date of retirement but upon the status of those technically and properly known as "a member of a uniformed service retired." The persons having this retired status as of June 1, 1958, and who remain members of the uniformed services, such as these petitioners, are the ones who are given the right by Section 4(b) of continuing to have their retired pay computed in light of the new active pay scales established in 1958. The continuation of that method of computation, as prescribed by the earlier and unrepealed provisions of law, obviously cannot be considered repealed by Section 4(b) itself or by its reference to "Notwithstanding any other provision of law." Section 4(b),

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[3] The Government suggests (Opp. Br. 8, fn. 3) that the term "transferred" in Section 4(b) refers to the act of being transferred on June 1, 1958, and hence the word "retired" also relates to a retirement effective on that date. But the words "transferred to the Fleet Reserve or Fleet Marine Corps Reserve" are also words of art, indicating the status of being transferred to those units. So also, "retired" refers in the context of this legislation and in the context of uniformed services laws and regulations to the status of being retired.

To read the word "retired" in this context as referring to status also gives meaning to the phrase "who is retired" in Section 4(c). That section provides that Section 5 of the Career Incentive Act of 1955 "does not apply to any person *who is retired*, or to whom retired pay . . . is granted, on or after the effective date of this Act." (Emphasis added.)

in short, clearly reconfirms and is consistent with petitioners' claims under the then existing law.

2. The Government's resort to legislative history (Opp. Br. 8-11), in an effort to reduce Section 4(b) to the vanishing point, likewise reveals an overemphasis and a misreading of certain legislative committee language. Much of the quoted language is isolated, out of context and unidentified as to the type of retirement being discussed. Thus when the Senate Armed Services Committee stated (Opp. Br. 9) that the bill had been clarified to make certain that "those persons retiring on the effective date of the bill would retire under the new rates" it was emphasizing the fact that those few who did retire on that date would have the stated benefit—but without denying the obvious fact that the bill provided that those members of the uniformed services in a retired status as of that date would have an option as between a 6% increase or an increase, as provided by the long-standing and still existent law, based on the new active duty pay scale.

In fact, there is not one word in the legislative history to support the assertion (Opp. Br. 11) that Congress intended to limit those in petitioners' category to a 6% increase, or to destroy their rights under prior and unrepealed laws. All of the emphasis in the legislative reports (see Opp. Br. 9-11) upon the conferring of the 6% increase upon those retired before the effective date of the Act must be read in light of the undeniable fact—apparently so obvious to these committees as to elicit no comment—that Congress simultaneously was recognizing and continuing in effect the 100-year-old statutory pattern of retirement pay increases tied to active pay scale increases for those who had earned the status of being retired members of the uni-

formed services. The fact that the very committees quoted by the Government took pains in the appendices to their reports to set forth as unamended the earlier provisions of law entitling petitioners to the retirement pay benefits of the new active duty pay scales fully confirms the continued vitality of those provisions. H. Rep. No. 1538, pp. 72-75 (85th Cong., 2d Sess.); S. Rep. No. 1501, pp. 64, 74 (85th Cong., 2d Sess.).

The Government, no more than the Court of Claims, cannot and does not explain away the fact that the pre-1958 statutory formulae *were not repealed until 1963 and that the United States Code retained those formulae until 1963.* The simple and only possible conclusion is that those formulae remained in effect during the 1958-1963 period, a conclusion buttressed by the fact that the formulae conform perfectly with the language used in 1958 in Section 4(b). By so doing, a meaningful and consistent statutory result is achieved. Congress, in short, did no more in 1958 than recognize and reconfirm the century-old formulae as respects those in petitioners' category, adding only the option of taking a 6% cost-of-living increase based on the old rates.

Thus the verbalistic considerations advanced by the Government, considerations which immediately bring into contention strong counter-vailing factors, underscore the need and appropriateness of a thorough review of the decision below by this Court. Absent that review, a most unsatisfactory chapter in statutory construction will have been finalized. And the repercussions upon the uniformed services and the national security, repercussions undenied by the Government and

emphasized by the *amicus curiae* brief herein, will be unchecked.

The cavalier treatment of this serious statutory problem by the court below and by the Government, in disregard of the specialized concern of Congress for those who have devoted their careers to the uniformed services, calls for the exercise of the review and corrective powers of this Court.

CONCLUSION

For these reasons, supplementing those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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